

See also: Vol. 3087
No. 15,805 ✓

**United States Court of Appeals
For the Ninth Circuit**

MAGNOLIA MOTOR & LOGGING Co.,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

WILKINS, LITTLE & MIX,

PHILIP C. WILKINS,

RICHARD N. LITTLE,

818 - 19th Street, Sacramento, California,

SIDNEY E. AINSWORTH,

485 East Main Street, Ashland, Oregon,

*Attorneys for Appellant
and Petitioner.*

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PAUL P. O'BRIEN, CL

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*To the Honorable Chief Judge, and to the Honorable
Associate Judges of the United States Court of
Appeals for the Ninth Circuit:*

Appellant herewith submits its petition for a rehearing and in support thereof advances the following points of law to be reconsidered by this court:

I. The acquittal of co-defendant R. Drew Lamb, coupled with prejudicial errors committed by the trial court, negatives the existence of any competent substantial evidence fairly tending to show criminal intent to support a verdict of guilty as to the appellant.

A. The trial court's instruction that Township 11½ was at all times the property of the

United States and that criminal intent could be found if appellant knowingly took property from anyone was erroneous and prejudicial.

B. The trial court's refusal to admit into evidence defendant's exhibit "H" was erroneous and prejudicial.

II. The conviction and sentencing of appellant under the felony Section 18 USCA 641 and 18 USCA 1361 was a violation of due process and equal protection under the federal constitution.

I. THE ACQUITTAL OF CO-DEFENDANT R. DREW LAMB, COUPLED WITH PREJUDICIAL ERRORS COMMITTED BY THE TRIAL COURT, NEGATIVES THE EXISTENCE OF ANY COMPETENT SUBSTANTIAL EVIDENCE FAIRLY TENDING TO SHOW CRIMINAL INTENT TO SUPPORT A VERDICT OF GUILTY AS TO THE APPELLANT.

Appellant respectfully contends that there is a complete lack of competent and substantial evidence showing an independent criminal intent on the part of appellant corporation. This element of criminal intent is the most important factor to be considered by this appellate court and unless proved by competent and substantial evidence the verdict of guilty must be reversed.

This honorable court bases its finding of criminal intent entirely on the actions of R. Drew Lamb, which criminal intent is then imputed to appellant. Appellant contends that not only were certain errors committed by the trial court which were so prejudicial

as to erroneously lead the jury into finding a criminal intent but that the *acquittal* of Lamb wiped out any independent criminal intent of the appellant. This court has not cited one item of proof of an independent intent which is an essential element to be proved by the government. *United States v. Lamb*, 150 Fed. Supp. 310; *Morrisette v. United States*, 342 U.S. 246.

The conviction of appellant must be based on evidence outside the facts so conclusively negated by the acquittal of Lamb. Appellant respectfully contends that the honorable court of appeal has misinterpreted appellant's position with regards to the inconsistency of the verdicts and has overlooked the importance of the language of the case of *Manley v. United States*, 238 Fed. 2d 221, which in effect holds that the reviewing court must be extraordinarily careful to scrutinize the record to ascertain any prejudicial error, and if such other prejudicial error exists to reverse the verdict of guilty.

Appellant has never contended that consistency in verdicts is required. It does earnestly contend, however, that there must be competent and substantial evidence upon which to support a conviction as to the defendant corporation. This honorable court not only has failed to discuss and pass on certain prejudicial errors raised by appellant but also has assumed as did the trial court that the actions of R. Drew Lamb, appellant's president and duly authorized agent, were criminal acts knowingly and wilfully done, albeit that said R. Drew Lamb was *acquitted* by the jury.

Where is the presumption of innocence? How can this court base its determination that there was sufficient evidence of a criminal intent on the part of appellant solely on the activities of Lamb, when the jury has determined that in spite of the overwhelming proof of action on the part of Lamb, which this court has said was done "wilfully, knowingly, and with criminal intent," he was acquitted? The jury must have found that Lamb acted on an honest belief, based on a thorough investigation, in reliance on advice of government maps and officials, and could not be held to a higher degree of knowledge than the government itself. If Lamb had no criminal intent, neither did appellant.

This is not a case, as are those cited by this court, where there were other agents or officers of the corporation in addition to the co-defendant, who were responsible for the acts and policies of the corporation.

Here, appellant's conviction, in the face of the evidence presented at the trial and co-defendant Lamb's acquittal, is so illogical that it must be rejected. Appellant earnestly believes that the jury found no criminal intent on the part of either Lamb or appellant but considered the matter as a civil action and attempted to assess the corporation for civil damages for converting government timber. Conduct which is not wilful is not criminal.

- A. The trial court's instruction that Township 11½ was at all times the property of the United States and that criminal intent could be found if appellant knowingly took property from anyone was erroneous and prejudicial.

Not only is there a complete lack of competent and substantial evidence showing an independent criminal intent on the part of appellant corporation but the trial court in giving the instruction, partially discussed in this court's opinion, in effect instructed the jury to disregard the fact that the survey of the alleged hiatus was not made until 1954 and that Township 11½ was not created by the filing of the survey on March 30, 1956, almost two years after the alleged crime was committed. This had a profound effect on the jury and a devastating effect on the defense of appellant.

The instruction negated the showing being made by appellant of its reliance on the maps and advice of competent federal officials. The trial court, in effect, said the efforts on the part of appellant to discover whether or not it in fact owned the land under dispute is "interesting . . . (but not) . . . particularly relevant."

In determining the issue of criminal intent, alone, the jury had a right to consider all of the facts as they related to the title to the land in question. The trial court instructed the jury to disregard all consideration of the survey and possible belief that appellant might have formed that it owned the land, because "as a matter of law, this particular unsurveyed land, which did exist, belonged to the United

States of America.” Its impact on the jury was to direct a verdict of guilty if it should find that cutting or acts of depredation were committed. Further, the court committed error in instructing the jury that they could find the necessary criminal intent if appellant stole property or depredated land owned by anyone other than itself. The necessary criminal intent to be found is the intention to take or depredate United States property.

B. The trial court’s refusal to admit into evidence defendant’s Exhibit “H” was erroneous and prejudicial.

This learned court has not discussed in its opinion the effect of excluding from the jury its right to consider defendant’s Exhibit “H”. Exhibit “H” was a letter written by a responsible agent of the governmental body charged with administering the public lands of the United States, which exhibit admitted that there was no official knowledge of the alleged hiatus. The purpose of admitting such document was to corroborate the prior testimony of defense witnesses who testified that there was a complete lack of knowledge of the existence of the hiatus on the part of the government prior to and during the times charged in the indictment. This is a criminal action wherein specific intent is a vital element. It was error for the court to refuse to admit into evidence any matter which is relevant in proving such a lack of criminal intent. This was but one more prejudicial error to be considered by the appellate court under the doctrine of the *Manley* case, which, coupled with

the acquittal of R. Drew Lamb, would compel this court to reverse the verdict of guilty for failure to prove specific intent as a matter of law.

II. THE CONVICTION AND SENTENCING OF APPELLANT UNDER THE FELONY SECTIONS 18 USCA 641 AND 18 USCA 1361 WAS A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION UNDER THE FEDERAL CONSTITUTION.

Appellant respectfully contends that under the language of the indictment and the proof brought out at the trial, if it be conceded that the necessary criminal intent existed, appellant should have been sentenced under the terms of the misdemeanor Sections 18 USCA 1852 or 18 USCA 1853. Appellant does not make this contention based on the belief that the logs were real property, as stated in this court's opinion, but on the grounds that Sections 18 USCA 1852 and 18 USCA 1853 are specific sections dealing with the course of conduct alleged to have been carried out by appellant. Sections 18 USCA 641 and 18 USCA 1361 are general statutes. Under the doctrine enunciated by Mr. Justice Black in his dissent in the case of *Barra v. United States*, 351 U.S. 131, it is a violation of due process as protected by the Fifth Amendment to the United States Constitution to charge and convict under a specific set of facts, the violation of which is either a misdemeanor or a felony, where the choice is left to the whim of the prosecuting authorities. Here we have specific applicable sections which must control over general sections, *United States v. Chase*, 135 U.S. 255.

Under the logic of the opinion of this court, the government, by electing to prosecute for activity which is prohibited by the specific sections, under general sections covering the same activity, can circumvent the intention of Congress and make a felony out of conduct held by Congress to be a misdemeanor only.

This court has in effect ruled that it is a far greater crime to steal and convert logs from government land than it is to cut the logs, remove and dispose of them from the same public lands. Appellant respectfully contends that the only crime, if any committed, was a misdemeanor in cutting and removing timber from public lands under an honest but (subsequently determined to be) mistaken belief that it bought and owned the land on which the timber was growing.

For the foregoing reasons appellant petitions for a rehearing.

Dated, Sacramento, California,
April 22, 1959.

Respectfully submitted,

WILKINS, LITTLE & MIX,
PHILIP C. WILKINS,
RICHARD N. LITTLE,
SIDNEY E. AINSWORTH,

*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

I hereby certify that I am one of the attorneys for appellant R. Drew Lamb. In my judgment the foregoing petition for rehearing is well founded. It is not interposed for delay.

Dated, Sacramento, California,

April 22, 1959.

RICHARD N. LITTLE,

Of Counsel for Petitioner.

